

AF  
BD OF APPEAL



6159/evd

"PATENT APPLICATION"

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
Before the Board of Patent Appeals and Interferences

RECEIVED  
APR 24 2012

USPTO-BPAI

In re Application of

Appeal No. 2011-002261

JAMES D. KROL

U.S. Serial No. 10/692,857

Group Art Unit 1794

Filed: October 27, 2003

L. Tran, Examiner

LOW CARBOHYDRATE FOOD PRODUCT  
AND METHOD OF MAKING THE SAME

- - - - -

Alexandria, Virginia  
April 16, 2012

Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

REQUEST FOR RECONSIDERATION

Dear Sir:

Applicant respectfully requests that the Board of Patent Appeals and Interferences ("Board") hereby reconsider the "Decision On Appeal" ("Decision") dated February 15, 2012. For the reasons set forth hereafter, applicant respectfully submits that the Board did not properly construe and apply the cited references to the claims or take into account certain limitations in the claims which are not disclosed or suggested the prior art.

RECEIVED  
OPAP/IAP  
APR 25 2012

I. Introduction

The Board's Decision affirms the examiner's rejection of claims 11-15 and 22-36 under 35 U.S.C. § 103 based on the primary reference to DEEP DISH PIZZA and the secondary reference to Google Groups.<sup>1</sup> The Board did not consider or decide the rejection based on the Low Carb Pizza reference and the Google Groups reference. Accordingly, this latter rejection is presumed withdrawn or implicitly reversed and will not be considered herein.

The primary issues for review on this request for reconsideration will be set forth briefly hereafter and then applicant will specifically consider each of the claims based thereon and the cited references. Applicant respectfully submits, as seen hereafter, that the Board did not properly interpret the DEEP DISH PIZZA reference and did not consider limitations in the claims which are not disclosed anywhere in either of these references or as generally known to one skilled in the art. Additionally, even assuming the Board's interpretation of DEEP DISH PIZZA is correct, there is no basis for a combining DEEP DISH

---

<sup>1</sup> Applicant will use the abbreviations used its appeal brief and by the Board in the Decision. Applicant will assume familiarity with the case and will not repeat the facts set forth in its appeal brief except to the extent necessary herein.

PIZZA with Google Groups and any such combination would not result in the claimed inventions. Any such combination would be based solely on the improper hindsight mosaicing of the prior art based on the knowledge of the claimed invention.

The Board misinterprets the DEEP DISH PIZZA reference in finding that the "sprinkle [of] Italian cheeses" over the bottom of the dish constitutes the claimed base layer. As the Board correctly found, "base layer" is used in the claims and the application to mean a replacement layer for a traditional dough/crust layer of a traditional pizza. See specification at, e.g., paragraphs 2, 8, 9, 18 and 19. This layer in applicant's claimed invention is the mixture of a dry formulated flour mixture and cheese [claim 11] or a mixture of flour and cheese to form a support layer [claim 27]. The layer has structure as acknowledged by the Board as it replaces the traditional dough/crust layer upon which additional ingredients are placed.

Additionally, independent claim 11 requires a "dry formulated flour mixture." This is more than the flour of the Google Groups reference and is essential to making the base layer of the crustless pizza of the invention. There is no disclosure of "a dry formulated flour mixture" in the Google Groups reference. The Board does not state how or

why one skilled in the art would use "a dry formulated flour mixture" as set forth in the claims with the DEEP DISH PIZZA. The Board does not state why one skilled in the art would generally know to make "a dry formulated flour mixture" to be combined with cheese to form the claimed base layer.

Further, independent claim 31 requires a base layer consisting essentially of flour and cheese and forming a support layer for the remaining ingredients of the pizza. The Board does not take into account the requirement of a base layer forming a support layer in its application of the references. The support layer in the DEEP DISH PIZZA reference is a combination of the sprinkle of cheese and the liquid mixture, otherwise the sprinkle of cheese of this reference could not support the additional ingredients.

Further, the Board did not consider the dependant claims argued on appeal. The Board held that these claim limitations would be known to one skilled in the art, without stating why it would be known to one skilled in the art or defining a person skilled in the art. These limitations are found nowhere in either of the DEEP DISH PIZZA reference or the Google Groups reference.

For the reasons set forth hereafter, applicant respectfully requests that the Board reconsider its decision

and reverse the rejection of the examiner. The DEEP DISH PIZZA reference and the Google Groups reference when combined do not disclose or suggest applicant's claimed invention. When the claim limitations are properly considered by the Board, including without a hindsight analysis, there is no reason for combining the references and any such combination does not result in applicant's claimed invention.

II. Rejection Of Claims 11-14 and 22-36  
Under 35 U.S.C. § 103(a)

A. Introduction

As stated by the Supreme Court in KRS Int'l Co. v. Teleflex Inc., 127 S.Ct. 1727, 82 USPQ2d 1385 (2007), the Patent Office must set forth what is disclosed in the prior art and compare the disclosure of the prior art to each of the claims which the Patent Office has rejected. The Patent Office must show why it would be obvious to combine the references relied upon by either showing some suggestion for combining the references within the references themselves or stating why it would be known to one skilled in the art to combine the references. The combined references must disclose the claimed invention. Applicant respectfully submits that this was not done in this case and the Board's decision is in error.

B. The References

The DEEP DISH PIZZA disclosure is in part as follows:

DEEP DISH PIZZA

How to prepare:

- (1) Preheat oven to 375 degrees;
- (2) Beat together cream cheese and eggs until smooth; add cream, parmesan, and spices and mix again;
- (3) Oil oblong casserole dish with olive oil or spray with PAM;
- (4) sprinkle the Italian cheeses over the bottom of the dish and pour the egg mixture over;
- (5) Bake for about 15 minutes; allow to stand for 5 minutes;
- (6) Spread on pizza sauce, sprinkle mozzarella, and pile on your favorite toppings;
- (7) Sprinkle with more Parmesan if desired; and
- (8) Return to oven and bake until bubble and browning.

As the Board found, applicant's claimed "base layer" is a substitute for the traditional dough/crust layer of a traditional pizza. Therefore, it must support the additional ingredients of the pizza. Thus, the base layer of DEEP DISH PIZZA is found in steps 1-5 and comprises the Italian cheese and the liquid mixture of cream cheese, eggs, cream, parmesan and spices. This forms the base layer which supports the additional ingredients and replaces the traditional pizza dough/crust.

However, the Board finds that the base layer of DEEP DISH PIZZA is merely the sprinkled cheese. This is not

correct as the cheese alone does not and can not take the place of the traditional dough/crust layer of a traditional pizza. Rather, it is the cheese and the liquid mixture which replace the traditional dough/crust layer of a traditional pizza.

Similarly, the sprinkled cheese can not form a "support" layer as required by certain of the claims. The Board Decision at page 7 states that the term base layer reads on sub-layers citing paragraph 21 of the specification. This is incorrect and contrary to the Board's finding that "base layer" encompasses any layer which replaces the traditional dough/crust layer of a traditional pizza, i.e. the support layer of the traditional pizza. Paragraph 21 of the specification refers to "mak[ing] the pizza of the present invention, the base layer mixture is poured into a suitable cooking pan[.]" (emphasis added) Accordingly, paragraph 21 does not support a finding that "base layer" means one or more of the ingredients of the base layer. On the contrary, the base layer includes the entire mixture of the base layer ingredients.

The Google Groups reference disclosure is in part as follows:

There are recipes for **low carb** crusts that use a little flour and some whey protein in a cook book

I bought...

The Google Groups reference does not disclose "a dry formulated flour mixture." Accordingly, there is no basis for finding that the Google Groups reference discloses a "formulated flour mixture," nor does the Board provide any basis except to state that this would be known to one skilled in the art of cooking pizzas without stating "why" this is so. Absent knowledge of applicant's invention, there is no basis for forming a base layer of either (1) "a dry formulated flour mixture" and cheese, or (2) "a base layer consisting essentially of flour and cheese and forming a support layer." See claims 11 and 27.

A combination of the DEEP DISH PIZZA recipe and the Google Groups disclosure would provide for the following recipe:

1. Beat together cream cheese and eggs until smooth, add cream, parmesan, spices and a little flour and some whey protein,<sup>2</sup> and mix again;
2. Oil oblong casserole dish with olive oil or spray with PAM;
3. Sprinkle the Italian cheeses over the bottom of the dish and pour the liquid egg mixture

---

<sup>2</sup> Arguably, based on the Board decision, the flour and whey could be added to step 3, but how is one skilled in the art to know how and where to combine the Google Groups flour and whey without the improper resort to applicant's invention.



over.

4. Bake for about 15 minutes; allow to stand for 5 minutes;
5. Spread on pizza sauce, sprinkle mozzarella, and pile on your favorite toppings;
6. Sprinkle with more Parmesan if desired;
7. Return to oven and bake until bubble and browning; and
8. Allow to stand for 10 more minutes before cutting.

In the alternative, based on the Board's Decision to achieve applicant's invention, the above recipe must be modified as follows:

1. Beat together cream cheese and eggs until smooth, add cream, parmesan, spices and mix again;  
**[DELETE THIS STEP]**
2. Oil oblong casserole dish with olive oil or spray with PAM;
3. Sprinkle the Italian cheeses over the bottom of the dish and **[DELETE pouring the liquid egg mixture over]** and **[ADD - a little flour and some whey]**;
4. Bake for about 15 minutes; allow to stand for 5 minutes **[DELETE THIS STEP]**;
5. Spread on pizza sauce, sprinkle mozzarella, and pile on your favorite toppings;
6. Sprinkle with more Parmesan if desired;
7. Return to oven and bake until bubble and browning; and
8. Allow to stand for 10 more minutes before

cutting.

However, there is no basis for this modification of the DEEP DISH PIZZA recipe in the prior art absent knowledge of applicant's invention.

C. Independent Claim 11

Independent claim 11 claims as follows:

11. A crustless pizza without a traditional dough crust layer comprising:

a base layer of non-liquid ingredients consisting essentially of a dry formulated flour mixture and cheese; and

at least one food layer on top of said base layer, wherein said crustless pizza is lower in carbohydrates than a non-crustless pizza having a dough crust.

This claim is directed to replacing the traditional dough/crust base layer of a traditional pizza with the claimed base layer. The crust layer of the DEEP DISH PIZZA is a combination of the cheese and the liquid mixture.

Otherwise the cheese would not function as a "crust layer" and would not support the other ingredients. The claim requires a base layer of non-liquid ingredients consisting essentially of a dry formulated flour mixture and cheese.

The DEEP DISH PIZZA reference in combination with the Google Groups reference does not teach or suggest these

limitations. The Google Groups reference does not disclose "a dry formulated flour mixture." For this reason alone the claim is not obvious. There is no basis (except improper hindsight) for taking the DEEP DISH PIZZA recipe and substituting the Google Groups "a little flour and some whey protein" for the liquid mixture poured onto the cheese of the DEEP DISH PIZZA, nor does the Board provide any basis for such a substitution. Further, the claim language is clear that the base layer is limited by the "consisting essentially of" language so there must be a substitution of the Google Groups flour and whey for the DEEP DISH PIZZA liquid mixture.

Further, claim 11 requires a base layer of non-liquid ingredients consisting essentially of a dry formulated flour mixture and cheese. The "consisting essentially of" language requires that the material ingredients in the mixture are the formulated flour mixture and cheese and precludes any other ingredients which materially affect the basic and novel properties of the invention. The Board Decision does not address this issue. With respect to claim 11, the DEEP DISH PIZZA reference when combined with the Google Groups reference does not teach or suggest a base layer of non-liquid ingredients consisting essentially of a dry formulated flour mixture and cheese.

Rather, it teaches a base layer of cheese and a liquid mixture including cream and beaten eggs. The ingredients of the DEEP DISH PIZZA of eggs, cream and cream cheese are different from and would clearly materially affect the base layer of applicant's claimed invention.<sup>3</sup>

Accordingly, the DEEP DISH PIZZA and Google Groups references do not teach one skilled in the art applicant's claimed inventions and the rejection of claim 11 must be reversed. For these same reasons, these references do not render dependent claims 12-14 and 35 obvious. Applicant also argued separately additional reasons for allowance of dependent claims 12, 13 and 35 which were not specifically addressed by the Board's Decision and are discussed hereafter.

D. Dependent Claim 12

Dependent claim 12 claims the crustless pizza of claim 11 wherein the dry formulated flour mixture comprises a high gluten flour and a double acting baking powder. The Board states that this limitation would be known to one skilled in the art but does not say why or point to any place in the cited references suggesting this limitation.

---

<sup>3</sup> This is so even taking into account the baking of the mixture as referenced in footnote 8 of the Decision.

Applicant respectfully submits that the KSR decision does not change the law that the Patent Office must provide some basis for why this claimed limitation would have been obvious to one skilled in the art at the time of the invention other than saying that one skilled in the art would know to modify DEEP DISH PIZZA to delete the liquid mixture and add "a little flour and some whey protein" of Google Groups and then, without knowledge of applicant's invention, decide that the "dry formulated flour mixture" should consist of "high gluten flour and double acting baking powder." There is absolutely no basis for this rejection.

E. Dependent Claim 13

Dependent claim 13 claims the crustless pizza of claim 12 wherein a batch of the dry formulated flour mixture comprises 6 cups of the high gluten flour and 2 tablespoons of the double acting baking powder, wherein the low carbohydrate crustless pizza comprises approximately one teaspoon of the batch of the dry formulated flour mixture. Since neither the DEEP DISH PIZZA nor Google Groups references teach high gluten flour or double acting baking powder as an ingredient thereof, the recipe does not teach the specific claimed amounts of high gluten flour and double

acting baking powder in a batch of dry formulated flour mixture or the specific amount of the mixture which is used in each pizza. For these reasons and as set forth for claim 12 and incorporated herein, the Board's Decision is in error and reconsideration is respectfully requested.

F. Dependent Claim 35

Dependent claim 35 claims the pizza of claim 11, wherein the total carbohydrates for the pizza is in the range of about 1.0 grams to about 3.5 grams per 4.2 ounce serving of the pizza. There is no disclosure in the DEEP DISH PIZZA reference, or the Google Groups disclosure as to the amount of carbohydrates in the pizzas disclosed therein, nor does the Board's Decision reference any. Accordingly, nothing in the combination of the cited references teach a pizza having total carbohydrates in the range of about 1.0 grams to about 3.5 grams per 4.2 ounce serving of pizza. There is no basis for finding that one skilled in the art would make a crustless pizza with such limitation, absent knowledge of applicant's invention. For these reasons and as set forth for Claim 12, the Board's Decision is in error and reconsideration is respectfully requested.

G. Independent Claim 27

Independent claim 27 claims as follows:

27. A pizza without a traditional dough crust consisting essentially of:

a base layer consisting essentially of flour and cheese and forming a support layer for the remaining ingredients of said pizza;

a layer of tomato sauce on top of said base layer;  
and

at least one food product layer on top of said layer of tomato sauce, wherein said pizza is lower in carbohydrates than a traditional pizza having a dough crust.

(emphasis added) This claim is specifically directed to a pizza not having a traditional dough/crust layer and instead having the claimed base layer acting as the support layer.

The Board's Decision apparently finds that it would have been obvious to one skilled in the art to substitute all of the liquid ingredients of the DEEP DISH PIZZA with the "little flour and some whey protein" referenced in the Google Groups reference. The Board does not state why the substitution would have been obvious. Absent knowledge of applicant's invention, there is no basis for such a substitution. Applicant respectfully requests reconsideration and withdrawal of the rejection or statement of the basis for this substitution in order that the record is complete for appeal.

Further assuming the Board Decision does not require a substitution of the liquid ingredients for the flour and whey but only an addition of the flour and whey, claim 27 requires a base layer consisting essentially of flour and cheese. The "consisting essentially of" transitional phrase requires that the material ingredients of the base layer are the flour and cheese and precludes any other ingredients which materially affect the basic and novel properties of the invention. With respect to claim 27, the DEEP DISH PIZZA reference when combined with the Google Groups reference does not teach or suggest a base layer consisting essentially of flour and cheese. Rather, it teaches a base layer of cheese and a liquid mixture including cream and beaten eggs. The ingredients of the DEEP DISH PIZZA of eggs, cream and cream cheese are different from and would clearly materially affect the base layer of applicant's claimed pizza.

Claim 27 is, therefore, not obvious based on the cited references and the rejection should be reversed. For these same reasons, the cited references do not render the dependent claims obvious, including as argued above for claims 12 and 35 and incorporated herein by reference.



H. Independent Claim 31

Independent claim 31 claims as follows:

31. A pizza without a traditional dough crust consisting essentially of:

a base layer consisting essentially of flour and cheese and forming a support layer for the remaining ingredients of said pizza;

a layer of cheese on top of said base layer;

a layer of tomato sauce on top of said cheese layer; and

at least one food product layer on top of said layer of tomato sauce, wherein said pizza is lower in carbohydrates than a traditional pizza having a dough crust.

(emphasis added) This claim is specifically directed to pizzas not having a traditional pizza crust. The claim requires a base layer consisting essentially of flour and cheese and forming a support layer for the remaining ingredients of the pizza. As seen above, the DEEP DISH PIZZA recipe in combination with the Google Groups reference does not teach or suggest these limitations. The DEEP DISH PIZZA recipe when combined with the Google Groups reference provides for a liquid mixture including cream and beaten eggs poured over the cheeses. This is contrary to the teaching of the invention of claim 31. Thus, even assuming a combination of references, one would have to delete the liquid mixture of the DEEP DISH PIZZA. There is no basis

for doing this absent knowledge of applicant's invention.

Accordingly, claim 31 is not rendered obvious based on the cited references and reconsideration is respectfully requested. For these same reasons, the cited references do not render the claims 32-34 obvious, including as argued above for claims 12 and 35 and incorporated herein by reference.

I. Independent Claim 22

Independent claim 22 claims the following method:

22. A method of making a crustless pizza without a traditional dough crust layer comprising the following sequence of steps:

preparing a dry formulated flour mixture comprising a high gluten flour and a baking powder;

distributing a pre-measured amount of said dry formulated flour mixture evenly onto a cooking pan;

distributing a pre-measured amount of a cheese evenly over said dry formulated flour mixture, wherein said dry formulated flour mixture and said cheese form a base layer;

distributing a pre-measured amount of a pizza sauce or a tomato sauce evenly over and on top of said base layer;

adding and distributing evenly a pre-measured amount of at least one food layer over and on top of said pizza sauce or said tomato sauce; and

baking said crustless pizza for a suitable time and at a suitable temperature, wherein said crustless pizza is lower in carbohydrates than a non-crustless pizza having a dough crust.

This claim claims a method following a specific sequence of steps. The sequence of steps are not disclosed in the DEEP DISH PIZZA recipe when combined with the Google Groups reference as seen above at pages 8 and 9. This combination of references does not disclose first preparing a dry formulated flour mixture comprising a high gluten flour and baking powder. The Board Decision does not address this issue except to state that this limitation would have been known to one skilled in the art without stating how or why. This Supreme Court decision in KSR still requires the Patent Office to provide some basis for why it would be obvious other than the conclusory statement that one skilled in the art would know to make the claimed formulated flour mixture.

For the foregoing reasons, the method claimed in claim 22 would not have been obvious to one skilled in the art in view of the cited references and reconsideration is respectfully requested. Similarly, for these same reasons and as set forth above for claims 12 and 35, the cited references do not render dependent claims 23-26 and 36 obvious under 35 U.S.C. § 103.


6159/USSN 10/692,857

III. Conclusion

Based on the above, applicant respectfully requests reconsideration and allowance of the claims.

Respectfully submitted,

JAMES D. KROL

By   
Theodore A. Breiner, Attorney  
Registration No. 32,103  
BREINER & BREINER, L.L.C.  
P.O. Box 320160  
Alexandria, Virginia 22320-0160

Telephone 703-684-6885